**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**APPELLATE SIDE**

CRIMINAL WRIT PETITION NO. 258 OF 2007

HARISHANKAR PANKDEY .. PETITIONER

Versus

THE STATE OF MAHARASHTRA & ORS.. RESPONDENTS

Mr. V.M. Thorat for petitioner

Mr. D. S. Mhaiskar, APP

Ms. Aliya N. Pathan for R-5

CORAM:-SMT. RANJANA DESAI &
ANOOP V. MOHTA, JJ.

DATED:- 8/3/2007

P.C.

. In this petition order dated 9/1/07 passed by the 3rd Additional District Judge, Thane, in Criminal Miscellaneous Application No. 161 of 2006 is under challenge.

2. In Criminal Writ Petition No. 2348 of 2005 filed by the applicant Ashish Pandey, the son of the petitioner through the petitioner, while disposing of the writ petition, this court directed the trial court to take appropriate decision in

respect of the claim of Ashish Pandey in the light of the decision rendered by the Supreme Court in **Ravinder Singh Gorkhi v. State of U.P. (2006) 2 SCC (Cri.) 632**.

3. Accordingly the learned Judge examined some witnesses and rejected the application of Ashish Pandey, wherein he claimed to be a juvenile and contended that therefore, the provisions of Maharashtra Control of Organised Crime Act, 1999 ("MCOC Act" for short) are not applicable to him.

4. We have heard Mr. Thorat learned counsel appearing for the petitioner.

5. He assailed the impugned order on several counts but in our opinion the impugned order must be set aside on account of one glaring infirmity which is pointed out to us by Mr. Thorat. Admittedly Dr. Chapalgaonkar, Civil Surgeon attached to Civil Hospital, Thane was examined by the learned Judge. According to Mr. Thorat, X-ray report and medical certificates were tendered in the court. However, the deposition of Dr. Chapalgaonkar is not on record. The medical documents are also not on the record and the

learned Judge has rejected the application of the petitioner, obviously without taking into consideration Dr. Chapalgaonkar's evidence and the medical documents.

6. In our opinion, in the facts of the case Dr. Chapalgaonkar's evidence and medical documents were of utmost importance and the learned Judge could not have disposed of the application without considering that evidence. We are unhappy at the manner in which the application was disposed of without considering vital evidence which was adduced before the court.

7. On the last occasion, therefore, we had directed the District and Sessions Judge, Thane to conduct an enquiry and submit his report to us. We had directed him to find out who is responsible for this lapse. Accordingly report dated 20th February, 2007 of the learned District and Sessions Judge is placed before us.

8. It appears that Dr. Chapalgaonkar's evidence was in fact recorded. It was in fact taken on the computer by Stenographer Smt. Todankar. The case of Smt. Todankar appears to be that she had saved

the same, however, when she tried to take out the print out she could not find it.

9. It appears that in that connection notice has been issued to Smt. Todankar and necessary action has already been taken. We hope and trust that the learned District and Sessions Judge shall take the enquiry to its logical conclusion.

10. So far as the impugned judgment is concerned, in the facts and circumstances of the case, therefore, we will have to set it aside and remand the application to the trial court with a direction to the trial court to consider the application afresh. Order accordingly. Both sides will be at liberty to lead such evidence as they desire.

11. The learned Judge shall summon Dr. Chapalgaonkar and other witnesses which the petitioner may want to examine, if she finds it necessary. So far as the X-ray report and other medical documents are concerned, the learned Judge shall take them on record in accordance with the principles underlying the production and exhibition of documents. Needless to say that this observation shall apply to production of documents,

if any by other witnesses also.

12. This entire exercise should be completed by the learned Judge within one month from the date of receipt of this order by her. We direct the learned Judge to consider the evidence afresh, independently and without being influenced by the earlier proceedings.

13. In the circumstances we direct that until the decision of this application and for a period of two weeks thereafter, the petitioner's son be kept in remand home at Bhiwandi.

14. We make it clear that, we have not expressed any opinion on the merits of the case and the impugned order is not set aside on merits.

15. Petition is disposed of.

16. Office to give authenticated copy.

JUDGE.

JUDGE.